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April 1, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: August 24, 2004

Case No.: TIA-0174

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant

appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a project manager assistant and clerk/typist at DOE's Oak Ridge site (the site). The Applicant filed an application with OWA, requesting physician panel review of one illness - breast cancer.

The Physician Panel rendered a negative determination on the claimed breast cancer. The Panel determined that the Applicant's radiation exposure levels were insufficient to have caused, contributed to, or aggravated her illness.

The OWA accepted the Physician Panel's determinations on the claimed illnesses. The Applicant filed the instant appeal.

In her appeal, the Applicant maintains that the Panel's negative determination is incorrect. The Applicant states that the National Institute for Occupational Safety and Health (NIOSH) dose reconstruction information should have been a part of her file. She further states that the dates of employment discussed in the panel report were incorrect, and asserts that the corrected dates would have made a difference in the Panel's determination of her claim.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

The Applicant's argument that the NIOSH dose reconstruction report should have been part of her file does not indicate OWA or panel error. The case history shows that the NIOSH report indicated less than a 50% probability of causation. Record at 21. Accordingly, the record indicates that the inclusion of the NIOSH dose reconstruction would not have changed the result. If the Applicant believes that the NIOSH report supports her claim, she should contact the DOL on how to proceed.

The Applicant's assertion regarding her employment period also does not indicate panel error. In making its determination, the Panel used the dates 1985 to 1997. Those are the dates listed by the Applicant on her application. Record at 17-18. Although the Applicant now asserts that she worked at the site until 1998, there is nothing in the record that indicates that the Applicant worked at the site beyond 1997. Accordingly, the Panel's consideration of the dates listed in the record was not panel error. If the Applicant wishes to pursue her assertion that her employment ended in 1998, rather than 1997, she should contact DOL on how to proceed.

As the foregoing indicates, the appeal does not present a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0174 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 1, 2005